Financial Capacity Considerations for Attorneys work with Older Clients

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Overview

- I. Syndromes that affect cognition:

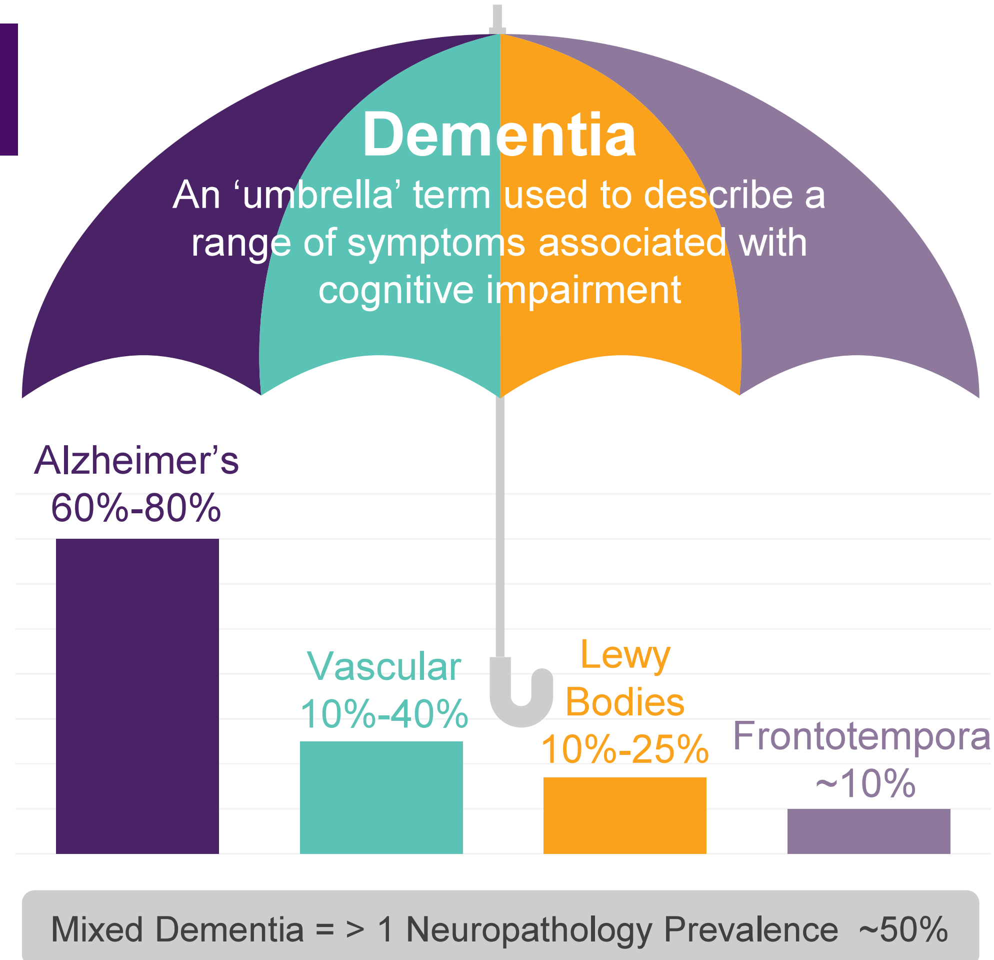
Dementia, Delirium, Frailty

II. Financial decision-making assessment

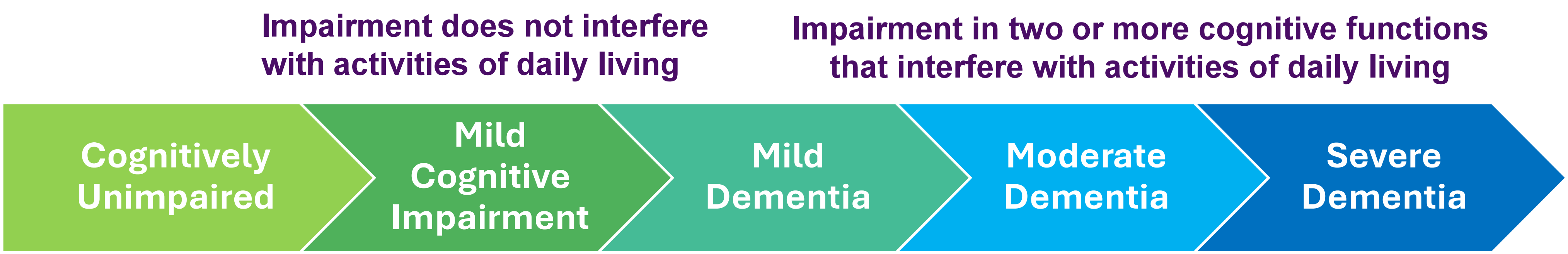
III. Issues related to Undue Influence

DEMENTIA IS A SYNDROME

- Dementia is a collection of symptoms related to cognitive decline
- Can include cognitive, behavioral and psychological symptoms
- Due to biological changes in the brain
- Alzheimer’s is most common cause
- Mixed dementia is very prevalent
- Some causes of cognitive decline are reversible and not truly dementia



CONTINUUM OF COGNITIVE IMPAIRMENT



MCI is a known risk factor for dementia

Everyone who experiences dementia passes through MCI

Not everyone with MCI goes on to develop dementia

Self Report: Awareness

Tranel interview

- Any changes in your thinking ability
- Ever confused about where you are
- Are you having any trouble with your memory

Symptoms of Dementia Screener (SDS) Mundt 2001

- Informant questionnaire
- 11 yes/no questions
- No special training needed to administer
- Does not require face-to-face administration (could be completed in waiting room, over phone, or by mail)

SDS items 1-6

1. Does he/she often repeat himself/herself or ask the same question over and over?

2. Is he/she more forgetful, that is, have trouble with short-term memory?

3. Does he/she need reminders to do things like chores, shopping, or taking medicine

4. Does he/she forget appointments, family occasions, or holidays?

5. Does he/she seem sad, down in the dumps, or cry more often than in the past?

6. Has he/she started having trouble doing calculations, managing finances, or balancing the checkbook?

SDS items 7-11

7. Has he/she lost interest in his/her usual activities such as hobbies, reading, church, or other social activities?

8. Has he/she started needing help eating, dressing, bathing, or using the bathroom?

9. Has he/she become irritable, agitated, or suspicious or started seeing, hearing, or believing things that are not real?

10. Are there concerns about his/her driving, for example, getting lost or driving unsafely?

11. Does he/she have trouble finding the words he/she wants to say, finishing his/her sentences, or naming people or things?

Four Best Items for Early Detection

- Repeated Questions (item 1)
- Psychiatric Symptoms (item 8)
- Difficulty Driving (item 10)
- Short term Memory Problems (item 2)
- Cutoff score of 4: 82% PPV, 93.5% NPV

SDS interpretation

- Greater number of items endorsed indicates greater likelihood of dementia
- 5 or more symptoms (Mundt validation study)
  - 90% sensitivity
  - 85% specificity
- Primary care sample (Flaherty et al, 2018)
  - 78% sensitivity
  - 84% specificity

Section Review

- Dementia involves cognitive, functional and behavioral/psychiatric functions
- Alzheimer’s (and mixed dementia) most common in older adults
- Mild Cognitive Impairment does not always progress to dementia.

Delirium

- **Acute Change in Cognition**
  - **Develops over hours to days**
- **Fluctuating Course throughout the day**
- **Reduced ability to focus, sustain, or shift Attention**
- **Disorganized Thinking**
- **Disturbance of Consciousness**
  - **Hyperactive (25%)**
  - **Mixed (25%)**
  - **Hypoactive (50%)**

DSM-IVr 2001:Section 3-18

Underlying medical condition(s)…

…altered physiology, which must be corrected in order to address delirium!

Delirium

Risk factors:

- Underlying dementia
- Recent surgery
- Dehydration/renal insufficiency
- Multiple medications
- Older age

Inouye SK, et al. Ann Int Med, 1993
Inouye SK, et al. J Ger Psych Neur, 1998

Suggested tool…

Confusion Assessment Method (CAM)

CAM…

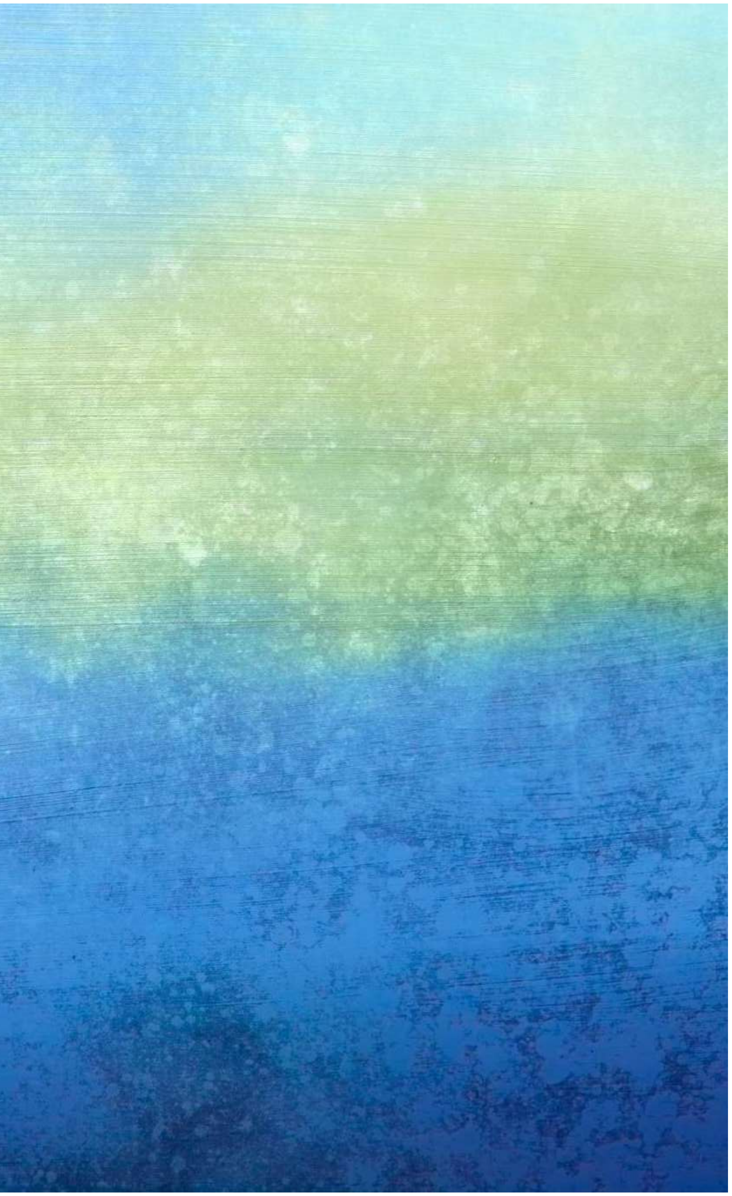
- **Simple, standardized tool (validated)**
- **Used by non-psychiatrically trained physicians and nurses**

The tool…

Confusion Assessment Method (CAM)

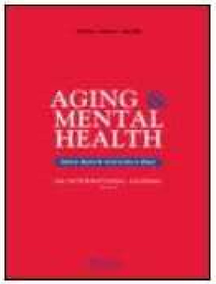
1. **Acute onset and fluctuating course of mental status change**
2. **Inattention**
3. **Disorganized thinking**
4. **Altered level of consciousness**

Diagnosis requires 1 & 2 along with either 3 or 4



Section Review

- Delirium is a syndrome distinct from dementia.
- Hospitalized older adults frequently experience delirium
- Delirium can clear (though not always or all the way)
- Re-assessments can be helpful after delirium has cleared



Aging & Mental Health

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The Paulson–Lichtenberg Frailty Index: evidence for a self-report measure of frailty

Daniel Paulson & Peter A. Lichtenberg

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To link to this article: http://dx.doi.org/10.1080/13607863.2014.986645

General Methods

- Frailty (2000, 2004, 2008)
  - 5-items reflecting different facets of the frailty syndrome
    - **Weakness**: (Because of a health problem do you have any difficulty) with lifting or carrying weights over 10 pounds, like a heavy bag of groceries?
    - **Slowness**: (Because of a health problem do you have any difficulty) with getting up from a chair after sitting for long periods?
    - **Fatigue**: Have you had any of the following persistent or troublesome problems: severe fatigue or exhaustion?
    - **Wasting**: Loss of 10% or more of body weight over 2 years
    - **Falls**: Have you fallen down in the last 2 years?
  - Respondents with 3 or more symptoms were identified as frail
  - Frailty Index demonstrates very similar relationships with demographic variables, ADL disability, hospitalization, disease, S-R health, cognition and mood as Fried's (2001) model.

General Methods

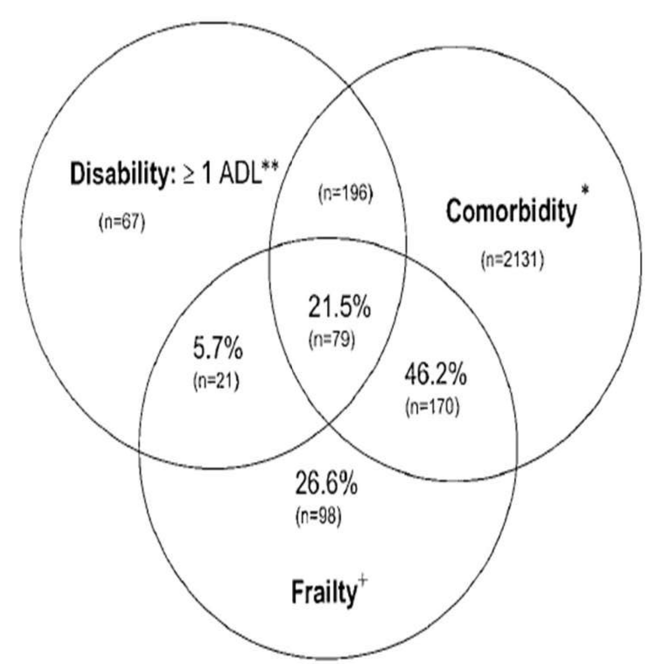
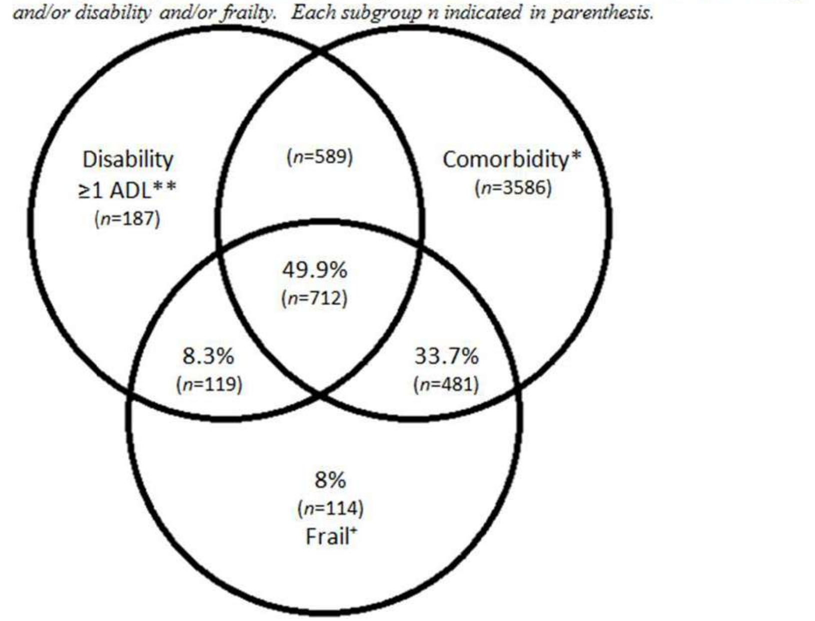
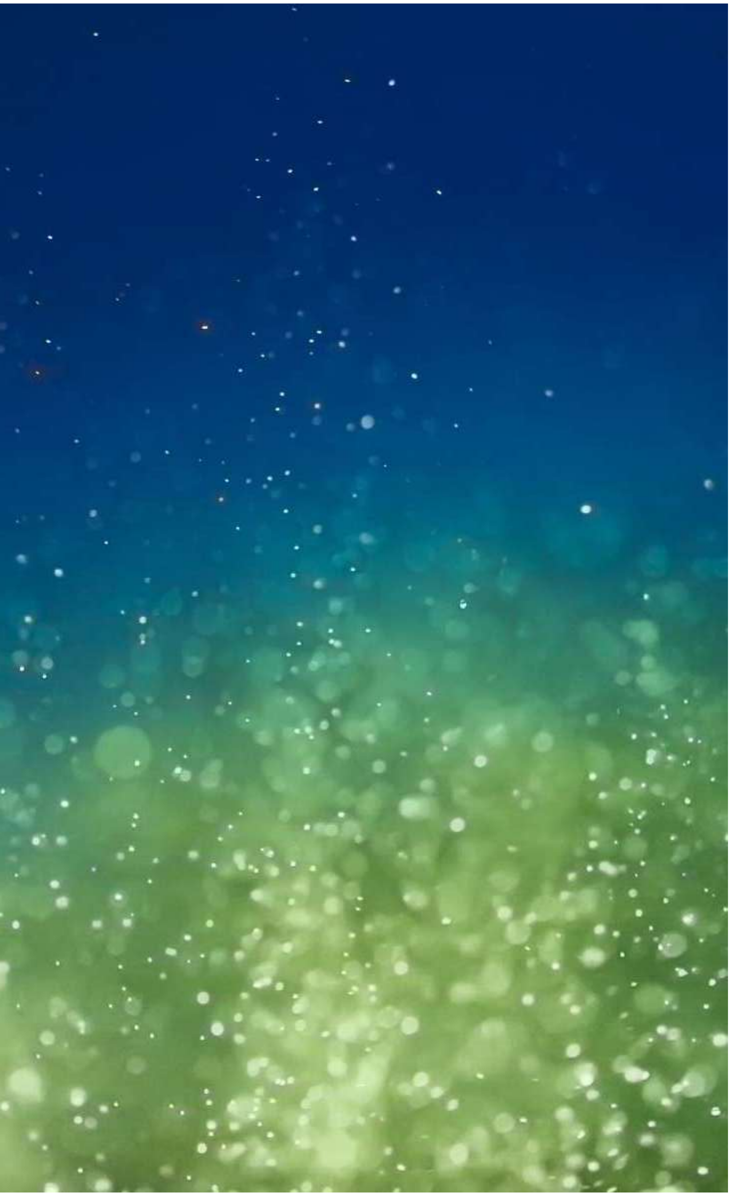


Figure 1

Venn diagram displaying extent of overlap of frailty with ADL disability and comorbidity (≥2 diseases). To represented: 5,788 (63.4% of total sample) participants who had comorbidity and/or disability and/or frailty. Each subgroup n indicated in parenthesis.



Fried et al, 2001 and Paulson & Lichtenberg data



Section Review

Frailty is the result of decline across major organ systems

The syndrome is reflected in common areas of functioning

Financial Capacity (FC)	A quality of an individual – here defined through psychological research	1. Financial execution 2. Financial decision making 3. Financial Management
Financial Incapacity (FIC)	A legal characteristic of an individual – here defined through conservatorship statutes	1. Inability to manage money and property due to a neurocognitive or mental health condition 2. High risk of waste or dissipation of property without intervention
Financial Decision Making (part 2 of FC)	An aspect of financial capacity	1. Understanding 2. Appreciation 3. Reasoning 4. Choice
Financial Exploitation	A relationship between two persons	1. Improper use of funds, property or resources by another 2. A form of elder abuse 3. Diminished financial capacity increases your risk for financial exploitation.

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2. Decisional Abilities: Appelbaum and Grisso

- See: Assessing Diminished Capacity in Older Adults: Handbook for Psychologists (apa.org– aging site)

- Older adult can communicate choice?
- Older Adult can communicate an understanding of that choice
- Older Adult can communicate an appreciation of the consequences of that choice
- Older Adult can demonstrate reasoning around the choice (e.g. rationale)

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A Person-Centered Approach to Financial Capacity Assessment: Preliminary Development of a New Rating Scale

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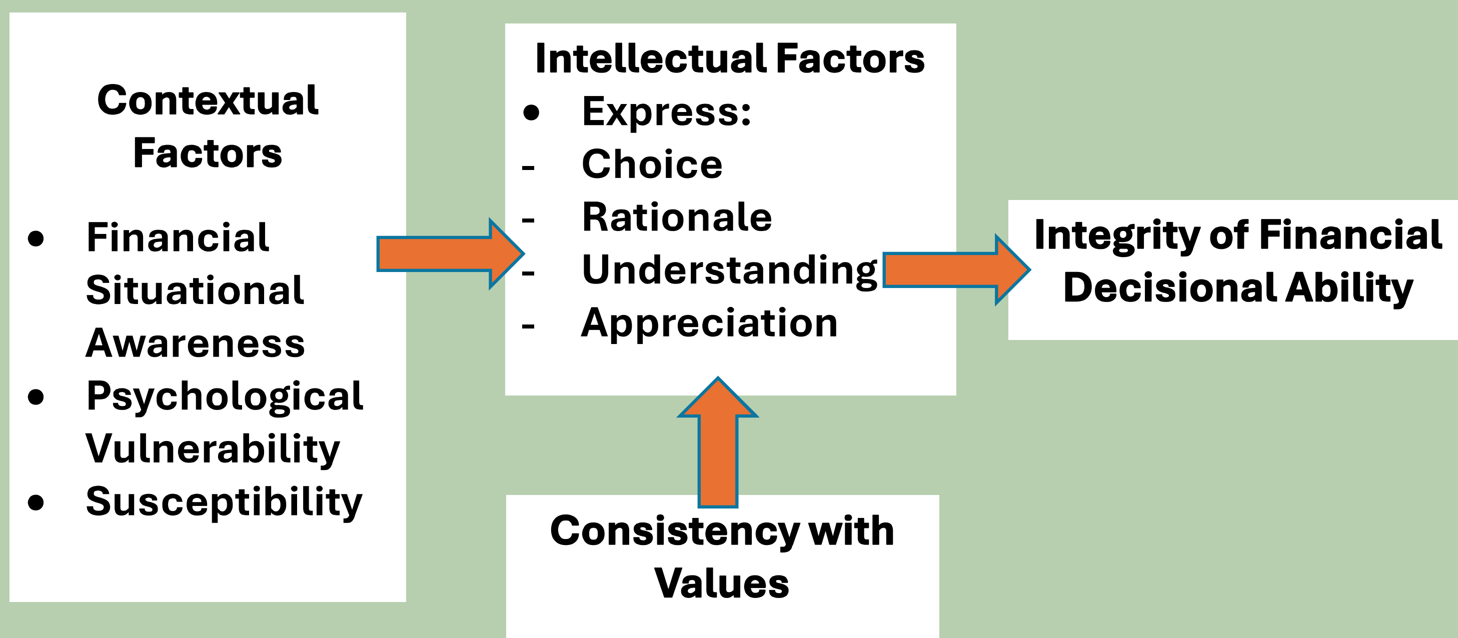
Expert Panelists

- Using the Concept Mapping Model (Conrad et al., 2010) we then assembled two groups of experts:
- 6 were engaged in financial-capacity work across the nation and
- 14 were local and worked directly, on a daily basis, with older adults making sentinel financial decisions and transactions
- Create new conceptual model for FDM
- Create Final list of items for scale

Conceptual Model for the Lichtenberg Financial Decision Rating Scale (LFDRS)



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New National Data
Health and Retirement Study 2020 release

- Anxious about financial decisions, at least sometimes – 65%
- Wish had someone to talk with about finances, at least sometimes – 55%
- Worried that someone will take away one's financial freedom, at least sometimes – 32%
- Confident making big financial decisions? Unsure/not confident – 26%
- Treated with less respect and courtesy during financial transactions, at least sometimes – 30%
- Talked into a decision to spend money that originally did not want to, at least sometimes – 22%

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Journal of Elder Abuse & Neglect

Routledge
Taylor & Francis Group

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The Lichtenberg Financial Decision Screening Scale (LFDSS): A new tool for assessing financial decision making and preventing financial exploitation

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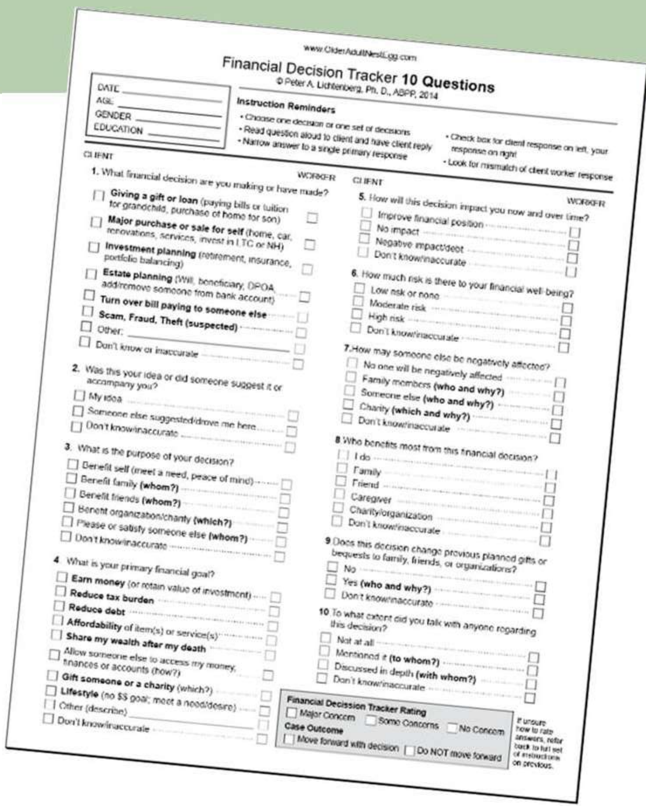
Lichtenberg Financial Decision Screening Scale (LFDSS)



www.OlderAdultNestEgg.com

Financial Decision Tracker 10 Questions

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DATE ____
AGE ____
GENDER ____
EDUCATION ____

Instruction Reminders

- Choose one decision or one set of decisions
- Read question aloud to client and have client reply
- Narrow answer to a single primary response
- Check box for client response on left, your response on right
- Look for mismatch of client worker response

CLIENT / WORKER

1. What financial decision are you making or have made?
   - ☐ **Giving a gift or loan** (paying bills or tuition for grandchild, purchase of home for son) ☐
   - ☐ **Major purchase or sale for self** (home, car, renovations, services, invest in LTC or NH) ☐
   - ☐ **Investment planning** (retirement, insurance, portfolio balancing) ☐
   - ☐ **Estate planning** (Will, beneficiary, DPOA, add/remove someone from bank account) ☐
   - ☐ **Turn over bill paying to someone else** ☐
   - ☐ **Scam, Fraud, Theft (suspected)** ☐
   - ☐ Other: ____ ☐
   - ☐ Don't know or inaccurate ☐
2. Was this your idea or did someone suggest it or accompany you?
   - ☐ My idea ☐
   - ☐ Someone else suggested/drove me here ☐
   - ☐ Don't know/inaccurate ☐
3. What is the purpose of your decision?
   - ☐ Benefit self (meet a need, peace of mind) ☐
   - ☐ Benefit family **(whom?)** ☐
   - ☐ Benefit friends **(whom?)** ☐
   - ☐ Benefit organization/charity **(which?)** ☐
   - ☐ Please or satisfy someone else **(whom?)** ☐
   - ☐ Don't know/inaccurate ☐
4. What is your primary financial goal?
   - ☐ **Earn money** (or retain value of investment) ☐
   - ☐ **Reduce tax burden** ☐
   - ☐ **Reduce debt** ☐
   - ☐ **Affordability** of item(s) or service(s) ☐
   - ☐ **Share my wealth after my death** ☐
   - ☐ Allow someone else to access my money, finances or accounts (how?) ☐
   - ☐ **Gift someone or a charity** (which?) ☐
   - ☐ **Lifestyle** (no $$ goal; meet a need/desire) ☐
   - ☐ Other (describe) ____ ☐
   - ☐ Don't know/inaccurate ☐

CLIENT / WORKER

5. How will this decision impact you now and over time?
   - ☐ Improve financial position ☐
   - ☐ No impact ☐
   - ☐ Negative impact/debt ☐
   - ☐ Don't know/inaccurate ☐
6. How much risk is there to your financial well-being?
   - ☐ Low risk or none ☐
   - ☐ Moderate risk ☐
   - ☐ High risk ☐
   - ☐ Don't know/inaccurate ☐
7. How may someone else be negatively affected?
   - ☐ No one will be negatively affected ☐
   - ☐ Family members **(who and why?)** ☐
   - ☐ Someone else **(who and why?)** ☐
   - ☐ Charity **(which and why?)** ☐
   - ☐ Don't know/inaccurate ☐
8. Who benefits most from this financial decision?
   - ☐ I do ☐
   - ☐ Family ☐
   - ☐ Friend ☐
   - ☐ Caregiver ☐
   - ☐ Charity/organization ☐
   - ☐ Don't know/inaccurate ☐
9. Does this decision change previous planned gifts or bequests to family, friends, or organizations?
   - ☐ No ☐
   - ☐ Yes **(who and why?)** ☐
   - ☐ Don't know/inaccurate ☐
10. To what extent did you talk with anyone regarding this decision?
   - ☐ Not at all ☐
   - ☐ Mentioned it **(to whom?)** ☐
   - ☐ Discussed in depth **(with whom?)** ☐
   - ☐ Don't know/inaccurate ☐

Financial Decission Tracker Rating
☐ Major Concern ☐ Some Concerns ☐ No Concern
Case Outcome
☐ Move forward with decision ☐ Do NOT move forward

If unsure how to rate answers, refer back to full set of instructions on previous.

AKA –
"Financial Decision Tracker"(FDT)

10-item screening questions: Foundational to the Rating Scale

https://www.OlderAdultNestEgg.com

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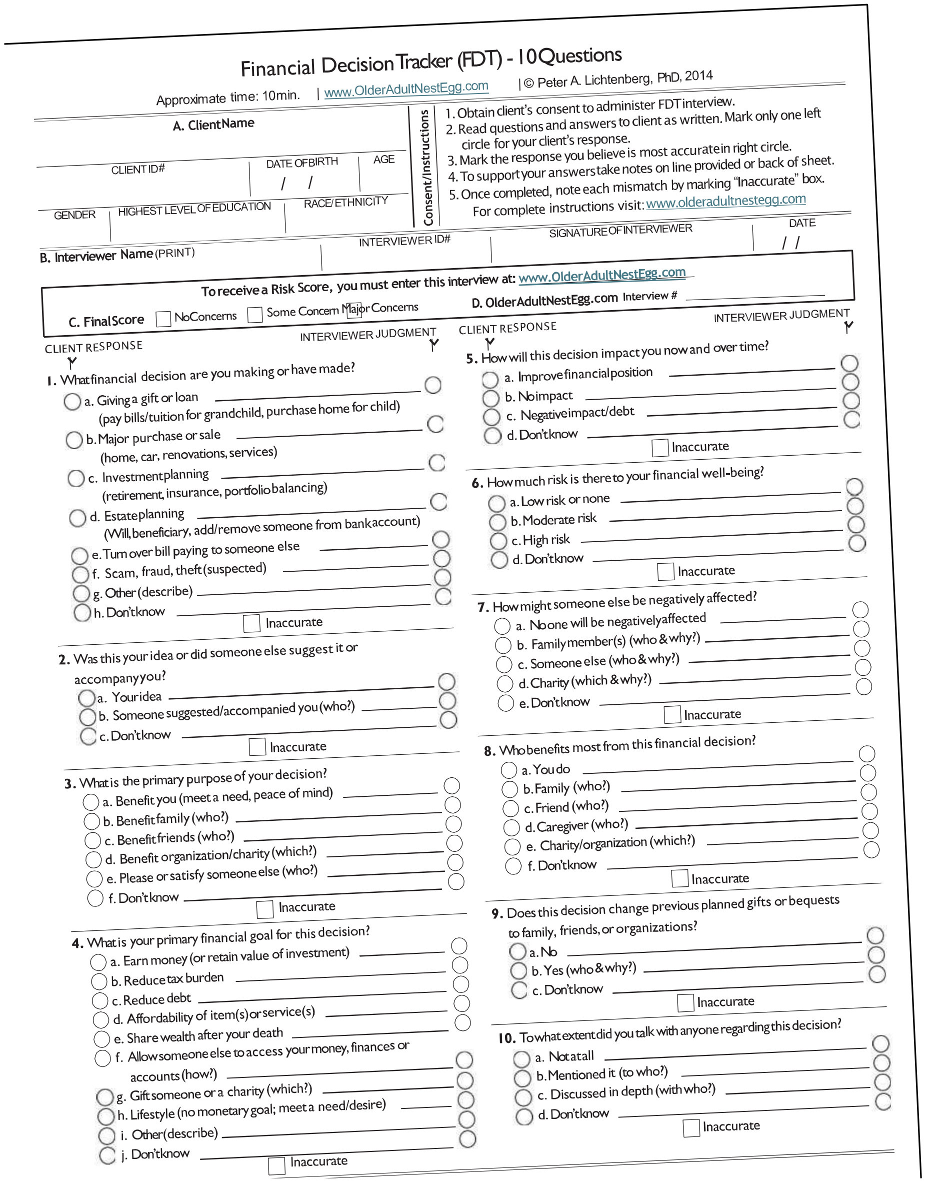
Financial Decision Tracker (FDT) - 10 Questions

Approximate time: 10min. | www.OlderAdultNestEgg.com | © Peter A. Lichtenberg, PhD, 2014

A. Client Name

CLIENT ID# | DATE OF BIRTH / / | AGE

GENDER | HIGHEST LEVEL OF EDUCATION | RACE/ETHNICITY

Consent/Instructions

1. Obtain client's consent to administer FDT interview.
2. Read questions and answers to client as written. Mark only one left circle for your client's response.
3. Mark the response you believe is most accurate in right circle.
4. To support your answers take notes on line provided or back of sheet.
5. Once completed, note each mismatch by marking "Inaccurate" box. For complete instructions visit: www.olderadultnestegg.com

B. Interviewer Name (PRINT) | INTERVIEWER ID# | SIGNATURE OF INTERVIEWER | DATE / /

To receive a Risk Score, you must enter this interview at: www.OlderAdultNestEgg.com

C. Final Score ☐ No Concerns ☐ Some Concern ☐ Major Concerns

D. OlderAdultNestEgg.com Interview #

CLIENT RESPONSE | INTERVIEWER JUDGMENT

1. What financial decision are you making or have made?
   - a. Giving a gift or loan (pay bills/tuition for grandchild, purchase home for child)
   - b. Major purchase or sale (home, car, renovations, services)
   - c. Investment planning (retirement, insurance, portfolio balancing)
   - d. Estate planning (Will, beneficiary, add/remove someone from bank account)
   - e. Turn over bill paying to someone else
   - f. Scam, fraud, theft (suspected)
   - g. Other (describe)
   - h. Don't know
   - ☐ Inaccurate

2. Was this your idea or did someone else suggest it or accompany you?
   - a. Your idea
   - b. Someone suggested/accompanied you (who?)
   - c. Don't know
   - ☐ Inaccurate

3. What is the primary purpose of your decision?
   - a. Benefit you (meet a need, peace of mind)
   - b. Benefit family (who?)
   - c. Benefit friends (who?)
   - d. Benefit organization/charity (which?)
   - e. Please or satisfy someone else (who?)
   - f. Don't know
   - ☐ Inaccurate

4. What is your primary financial goal for this decision?
   - a. Earn money (or retain value of investment)
   - b. Reduce tax burden
   - c. Reduce debt
   - d. Affordability of item(s) or service(s)
   - e. Share wealth after your death
   - f. Allow someone else to access your money, finances or accounts (how?)
   - g. Gift someone or a charity (which?)
   - h. Lifestyle (no monetary goal; meet a need/desire)
   - i. Other (describe)
   - j. Don't know
   - ☐ Inaccurate

5. How will this decision impact you now and over time?
   - a. Improve financial position
   - b. No impact
   - c. Negative impact/debt
   - d. Don't know
   - ☐ Inaccurate

6. How much risk is there to your financial well-being?
   - a. Low risk or none
   - b. Moderate risk
   - c. High risk
   - d. Don't know
   - ☐ Inaccurate

7. How might someone else be negatively affected?
   - a. No one will be negatively affected
   - b. Family member(s) (who & why?)
   - c. Someone else (who & why?)
   - d. Charity (which & why?)
   - e. Don't know
   - ☐ Inaccurate

8. Who benefits most from this financial decision?
   - a. You do
   - b. Family (who?)
   - c. Friend (who?)
   - d. Caregiver (who?)
   - e. Charity/organization (which?)
   - f. Don't know
   - ☐ Inaccurate

9. Does this decision change previous planned gifts or bequests to family, friends, or organizations?
   - a. No
   - b. Yes (who & why?)
   - c. Don't know
   - ☐ Inaccurate

10. To what extent did you talk with anyone regarding this decision?
    - a. Not at all
    - b. Mentioned it (to who?)
    - c. Discussed in depth (with who?)
    - d. Don't know
    - ☐ Inaccurate

FDT contains 10 items

- Must be tied to actual decision or related set of decisions
  - Is a Rating Scale
  - Get trained on https://olderadultnestegg.com
- An overall risk score is assigned

10 Questions from LFDSS

1. ***What is the financial decision you are making?* Choice**
2. Was this your idea or did someone suggest it or accompany you? **Autonomy**
3. What is the purpose of your decision? **Rationale**
4. What is the primary financial goal? **Understanding**
5. How will this decision impact you now and over time? **Understanding**
6. How much risk is involved? **Appreciation**
7. How may someone else be negatively affected? **Appreciation**
8. Who benefits most from this financial decision? **Understanding**
9. Does this decision change previous planned gifts or bequests to family, friends, or organizations? **Appreciation**
10. To what extent did you talk with anyone regarding this decision? **Autonomy**

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Interviewer Agreement with Risk Score for Overall Sample (N=839)

Table 2. Interviewer Agreement With Risk Score for Overall Sample ($N = 839$)

	Interviewer agreed with FDT risk rating	Interviewer disagreed with FDT risk rating	Interviewer reduced risk rating compared with FDT risk recommendation	Interviewer increased risk rating compared with FDT risk recommendation
	n	*n*	*n*	*n*
Cases	773 (92.13%)	66 (7.87%)	31 (3.69%)	35 (4.17%)

Note: FDT = Financial Decision Tracker.

Section Overview

Informed financial decision-making is the core principle behind financial capacity (testamentary, contractual, donative)

The 10-item Lichtenberg screening scale provides an efficient and evidence-based rating scale for informed financial decision-making

4. Assessment for Undue Influence

Undue influence is influence so great it overpowers the decedent's free will and prevents her from doing as she pleases with her property.

To be "undue," the influence exerted upon the decedent must be of such a degree that it overpowered the decedent's free choice and caused her to act against her own free will and in accordance with the will of the person who influenced her.

The influence exerted may be by force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / other.

A will that results from undue influence is a will the decedent would not otherwise have made. It disposes of the decedent's property in a manner different from the disposition the decedent would have made had she been free of such undue influ

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Evidence of Undue Influence

Process not an event; all information relevant to process is allowable.

Undue influence takes place most often out of view and in private.

Power in the relationship and how it changes over time is important to assess

In cases of dementia paranoid ideation often present; Usually against someone who had a long and close relationship with the older person

Courts have also recognized that there may be a presumption of UI

PROCESS NOT AN EVENT

Must look at the entire picture, not just particular events

Ex: Dr. would you consider episode x and instance of undue influence?

Ans. UI is a process and not an event and you must look at the entire picture.

Metaphor: Running for a touchdown or a race… running between the 30-20-yard line is not a touchdown, it is the entire run.

Undue Influence takes place in private; out of view of others

Courts recognize the need to look at indirect and even hearsay evidence (e.g., emails, texts, journal entries, medical record notes that make a social observation)

Recent case: Medical record note accusing sister of misusing funds– came from the Perpetrator & came 6 months after knowing and signing a legal agreement that sister had not misused funds.

Have to look for a strong pattern of UI to form an opinion more powerful than just saying the person is susceptible to UI

Power in Relationship Changes

- Look for new dependency, new POA between victim and perpetrator
- Older adult becomes more subservient in the relationship and yields to the perpetrator
- Who makes appointments? Who pays the bills? Who communicates with doctor's office, bank, etc.

Paranoia in Dementia

- Is there poisoning of the relationship?
- Paranoia towards someone once very trusted is common in UI where dementia is present.
- Why: People with dementia lose security and often (even w/o any UI) lash out and become suspicious of those they are closest to

Presumption of UI

- Fiduciary role (even if not formal)
- Opportunity for influence
- Benefit or someone/some org. they champion benefits

- An attempt to even the evidentiary requirements when there is a question of facts (not summary judgement). Not have as much strength as one would hope. Burden to show UI still on the accuser.

Patterns to look for

- Undue Influence is a “species of fraud”—look for deception/power control issues
- Presents self as the decision-maker or victim defers to this new decision-maker
- Initiates appointments to arrange new financial arrangements: Deeds, change of beneficiary, joint accounts, will or trust
- Isolates the victim from personal supports
- Actively poisons the relationship between victim and close supports (e.g., “all he wants is your money; he wants to put you in a nursing home”)
- Deception/Secrecy often is key

Undue Influence Case Overview—Jury Trial

Mr. S suffered from end stage heart disease and while in Minnesota to receive care at the Mayo clinic (Minnesota is where his son resides and where Mr. S received care for over a decade) fell outside of son’s home on July 8, 2019 and suffered a moderate to severe traumatic brain injury. His recovery was hampered by an episode of sepsis, and a subdural hematoma seven weeks after the original injury. Mr. S’s condition stabilized upon his return the son’s home on October 4th until Mr. S became extremely agitated and aggressive on October 21st. He was hospitalized again on October 21st due to his agitation and aggression. During this October 21st hospitalization the evaluation at Mayo found that Mr. S continued to have significant cognitive deficits and in need of supervised living in the community.

Case continued

- Abruptly Mr. S moved into the house of a formerly estranged friend, P, on 11-26-2019 and opted out of his hospice care at the same time. Mr. S remained at P's home until his death July 30th, 2020.
- In February 2020 Mr. S executed a warranty deed, he ended his annuity contracts from November 2019 through July 2020 (and then made deposits and withdrawals from his bank totaling approximately $600,000.00 during that period) and in July 2020 he executed a Trust amendment. All of these changes were made to benefit P.

SCAM Analysis

- **Susceptibility**
- **Confidential Relationship/Isolation**
- **Active Procurement/Tactics**
- **Monetary Loss**

Summary

- We reviewed syndromes that cause cognitive decline and ways to ask about it
- An assessment tool for financial decision-making
- An overview of Undue Influence and things to look for